Demi's Leather Corp. ***and*** **Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC.** Cases 3–CA–17081, 3–CA–17149, 3–CA–17350, 3–CA–17789

January 26, 2001

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On August 21, 1996, the National Labor Relations Board issued a Decision, Order, and Direction in this proceeding,[1] in which it ordered the Respondent, inter alia, to (1) reinstate and make whole Anthony Valovic III for any loss of earnings suffered by reason of the Respondent's unlawful termination of his employment because of his union activities and (2) restore to their previous status and make whole Alan McArthur and Gregory Handy for any loss of earnings suffered by reason of the Respondent's unlawful permanent layoff of them because they engaged in union activities or testified in NLRB proceedings. On January 5, 1999,[2] the Respondent entered into a stipulation waiving its right to contest either the propriety of the Board's Decision, Order, and Direction or the findings of fact and conclusions of law underlying that Order.

A controversy having arisen over the amount of backpay due under the Board's Order, the Regional Director for Region 3 issued a compliance specification on April 23. On May 28 the Respondent filed an answer to the compliance specification.

On June 24 the General Counsel filed with the Board a motion to transfer proceedings to the Board, for partial summary judgment and to strike certain affirmative defenses. On June 25 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On July 20 the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment and to Strike Certain Affirmative Defenses

Section 102.56(b) and (c) of the Board's Rules and Regulations states:

> (b) *Contents of answer to specification*.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
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> (c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification*.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to so deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

1. The compliance specification

Relying on the above rule, the General Counsel seeks partial summary judgment with respect to the following allegations of the compliance specification:

Paragraph 4 of the compliance specification alleges that Valovic's gross backpay should be based on the earnings of two individuals who replaced Valovic during the backpay period: Sheldon Jacobson from March 1992 through the third quarter of 1995, and Milton Van Horne thereafter until the end of the backpay period. Jacobson and Van Horne were dry floor supervisors.

Paragraph 7 alleges that McArthur's gross backpay should be based on the earnings of his replacement. Paragraph 8(a) alleges that when the employment of his replacement (Samuel Surnear) ended in June 1998, no one was hired as a replacement and, consequently, no backpay is due after the June 1998 date.

Paragraph 10(a) alleges that Handy's gross backpay should be based on the earnings of his replacement;

[1] 321 NLRB 966.

[2] All subsequent dates refer to 1999 unless specified otherwise.

10(b) alleges that the replacement's gross earnings should be prorated because Handy worked on a part-time basis before he was unlawfully laid off, while the replacement was a full-time employee.

2. The Respondent's position

The Respondent denies the allegations in paragraphs 4, 7, 10(a), and 10(b). With respect to paragraph 8(a), the Respondent admits that Surnear's employment ended as alleged, but denies that Surnear or anyone else replaced McArthur.

In addition, the Respondent asserts the following affirmative defenses. With respect to Valovic, the Respondent asserts that his job was eliminated and that neither Jacobson nor Van Horne replaced him; that it is improper for the General Counsel to use supervisors as the basis for calculating backpay for a subordinate position; and that Valovic collected unemployment funds which should be credited to the Respondent in the backpay specification.

With respect to McArthur, the Respondent asserts that it is improper for the General Counsel to compare McArthur, an inexperienced employee, with a more experienced individual; and that the backpay specification should not be calculated on a quarterly basis.

With respect to Handy, the Respondent asserts that his job was eliminated and he was not replaced; that the person to whom the General Counsel compares Handy does not perform the same job; and that Handy had income from other sources for which the Respondent should receive a credit.

The Respondent's response to the notice to show cause reiterates its answer and affirmative defenses.

3. Analysis and conclusions

The Respondent's answer, affirmative defenses, and response to the notice to show cause raise two major issues. First, the Respondent contends that Valovic, McArthur, and Handy are not entitled to backpay because their jobs were eliminated and no one was hired to replace them. Second, the Respondent asserts that the individuals the General Counsel selected for comparison purposes are inappropriate.

First, we reject the Respondent's contention that Valovic, McArthur, and Handy are not entitled to backpay because the jobs for which they were hired were eliminated. It is axiomatic that the "finding of an unfair labor practice . . . is presumptive proof that some back pay is owed by the [Respondent]." *NLRB v. Mastro Plastics Corp*., 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U. S. 972 (1966); *Roman Iron Works*, 292 NLRB 1292 (1989). In the underlying proceeding, the judge found that the discharge of Valovic and permanent layoffs of McArthur and Handy were discriminatorily motivated. The assertion that the discriminatees' jobs were eliminated is not sufficient to avoid backpay liability.

Furthermore, by asserting that the discriminatees are not entitled to backpay because their jobs were eliminated, the Respondent is essentially seeking to relitigate what was, or could have been, litigated in the underlying proceeding. This the Respondent may not do in a supplementary proceeding to determine the amount of backpay. *Overseas Motors*, 277 NLRB 552, 553–554 (1985).[3]

The General Counsel's motion addresses the possibility that the Respondent is contending the discriminatees' positions were eliminated at some time subsequent to the unfair labor practice hearing. Initially, we believe that the General Counsel's reading of the Respondent's position is overly generous. We can find no statement in the Respondent's answer, affirmative defenses, or response that even hints that Valovic's, McArthur's, or Handy's jobs were eliminated at some time other than when they were discharged or laid off. Indeed, by taking the position in its Answer, that no one replaced McArthur, the Respondent seems to be contending only that McArthur's job disappeared when he was laid off.

Assuming, arguendo, the Respondent is making such a contention, we agree with the General Counsel that the answer fails to conform to the Board's rules quoted above. The Respondent supplies no date for when the jobs were eliminated. Further, if the jobs were eliminated at some time after the unfair labor practice hearing, the Respondent is obligated to provide alternative calculations for the period of time before the jobs were eliminated. Section 102.56(b) states that when a respondent disputes any matters within its knowledge, its answer must specifically set forth the grounds for its disagreement and furnish the appropriate supporting figures. See *Baumgardner Co*., 298 NLRB 26, 27 (1990). The date on which jobs were eliminated subsequent to the unfair labor practice hearing and supporting figures for alternative calculations are clearly within the Respondent's knowledge. The Respondent's answer falls far short of the specificity our rules require.

Second, we find insufficient the Respondent's assertions that the individuals the General Counsel selected for comparison purposes are inappropriate. We are guided by the following precedent.

[3] In addition, the Respondent's assertion that Valovic's job was eliminated is directly contradicted by the judge's finding in the underlying case that another employee was performing his job after his termination. 321 NLRB at 977.

In *J. Huizinga Cartage Co*., 308 NLRB 106, 107 (1992), the respondent asserted that it did not know the individual the General Counsel selected for backpay comparison purposes. In *DeMuth Electric*, 319 NLRB 942, 943 (1995), the respondent claimed that the General Counsel's selection of the employee next in seniority to the discriminatee was inappropriate for backpay comparison purposes because the respondent did not schedule work based on seniority. In both cases, the Board found the respondents' answers deficient because the answers did not set forth in detail the respondents' positions as to the applicable premises and did not furnish the appropriate supporting figures.

In the instant case, the Respondent asserts that it is improper to compare Valovic to supervisors, to compare McArthur to a more experienced employee, and to compare Handy to an employee who does not perform Handy's same job. These reasons for objecting to the persons named for comparison purposes are similar to the reasons the respondents asserted in the cases cited above.

As the Board explained in *DeMuth*,

> respondents are required to do more than simply criticize the bases for the specification . . . Although the [respondent] expresses disagreement with the General Counsel's allegations, it does not set forth in detail the Respondent's position as to the applicable premises and does not furnish the appropriate supporting figures.

In the instant case, the reasons the Respondent advances for objecting to the General Counsel's selection of the named individuals for comparison purposes are nothing more than expressions of disagreement with the General Counsel's allegations. The Respondent has not set forth in detail its position as to the applicable premises, nor has it furnished the appropriate supporting figures. Thus, the Respondent simply criticizes the bases for the specification. For the reasons set forth above, we shall grant the General Counsel's motion for partial summary judgment,[4] deem the allegations contained in paragraphs 4, 7, 8(a), 10(a), and 10(b) of the compliance specification to be true, and strike the Respondent's affirmative defenses related to paragraphs 4, 7, 8(a), 10(a), and 10(b) of the compliance specification.[5] Finally, we shall also grant the General Counsel's motion to strike the following:

a. The Respondent's contention that it should be credited for unemployment funds Valovic received and for "income [Handy received] from other sources which made him financially independent." Unearned income and collateral benefits, such as unemployment benefits, are not interim earnings and are not an offset against backpay liability. See NLRB Casehandling Manual (Part Three) Compliance Proceedings Sec. 10542.1; *United Enviro Systems*, 314 NLRB 1130, 1131 (1994); *Continental Insurance Co*., 289 NLRB 579, 601 (1988).

b. The Respondent's contention that McArthur's backpay should be limited to the difference between interim earnings and gross backpay for the entire backpay period, rather than computed on a quarterly basis. The Board has long held that the appropriate calculation method is a quarterly analysis. *F.W. Woolworth Co.*, 90 NLRB 289 (1950).

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to paragraphs 4, 7, 8(a), 10(a), and 10(b) of the compliance specification.

IT IS FURTHER ORDERED that the General Counsel's motion to strike the Respondent's affirmative defenses related to paragraphs 4, 7, 8(a), 10(a), and 10(b) of the compliance specification is granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 3 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, for the taking of evidence concerning issues properly raised by the Respondent's answer to the compliance specification.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a second supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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[4] It is well settled that a respondent may properly cure defects in its answer before a hearing either by an amended answer or a response to a notice to show cause. *Ellis Electric*, 321 NLRB 1205, 1206 (1996). Therefore, in considering the sufficiency of the Respondent's answer and affirmative defenses, we have also considered its response to the notice to show cause.

[5] At the end of the motion, the General Counsel for the first time refers to par. 9 of the compliance specification in the list of paragraphs he requests be deemed true. Although the Respondent's response opposes the request, the Respondent admitted par. 9 in its answer. The General Counsel's and the Respondent's references to par. 9 appear to be inadvertent errors, and we shall disregard them.